***THE HON'BLE SRI JUSTICE B. SESHASAYANA REDDY**

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+ W.P.No.16469 of 2004

%Dated 21.11.2005

#1.Shri Mohd. Mustafa Ahmed Alvi, S/o. late S.M.Idris Ahmed Alvi, R/o.H.No.16-2-854/1, Saidabad, Hyderabad-500 659 and others.

..... PETITIONERS

Vs.

$ 1. Union of India, rep. by the Secretary to Government Department of Revenue Ministry of Finance and Company Affairs, New Delhi and others.

....RESPONDENTS

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>HEAD NOTE:

! Counsel for the Petitioners: Mr.Ravi. S.,

^Counsel for the Respondents 1to 3: Mr.A.Rajasekhar Reddy

Central Government

Standing Counsel/

Asst.Solicitor General.

? Cases referred

1. AIR 2000 SUPREME COURT 811
2. (1995) 4 Supreme Court Cases 734

3. AIR 2004 S.C. 1467

HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

Writ Petition No.16469 of 2004

Dated: 21st November, 2005

Between:

1. Shri Mohd. Mustafa Ahmed Alvi, S/o. late S.M.Idris Ahmed Alvi,

R/o.H.No.16-2-854/1, Saidabad, Hyderabad-500 659

and others.

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Department of Revenue Ministry of Finance and Company

Affairs, New Delhi and others.

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HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

Writ Petition No.16469 of 2004

O R D E R :

This Writ Petition has been filed by the petitioners, who are five in number, with a prayer to call for the file of Union of India represented by the Secretary to Government, Department of Revenue, Ministry of Finance and Company Affairs, New Delhi-1st respondent in SO 308(E), dated 20.3.2003 and the consequential proceedings issued by the Commissioner of Customs, Custom House, Chennai-3rd respondent in File Nos.T-4/3-M/95/SCN(1), T-4/3-M/95-SCN-II, T-4/4-M/95-SCN-1, and T-4/4-M/95-SCN-II/Comr/Exp/Enf/15/2003 dated 20-8-2004 and declare the same to be illegal, arbitrary and without jurisdiction.

2. The Director of Directorate of Enforcement, New Delhi-2nd respondent registered cases against the petitioners for contravention of Sections 9(1)(a), 9((1)(b), 9(1)(d), 9(3) and 64(2) of Foreign Exchange Regulation Act, 1973 (hereinafter called as FERA). Show cause notices to the petitioners were issued on 22.2.1995 followed by call notices on various dates and the latest being 20.9.2004 requiring their appearance on 28.9.2004 for conduct of personal hearing. It is the contention of the petitioners that FERA has been repealed and in its place Foreign Exchange Management Act, 1999 (hereinafter called as FEMA) has been enacted w.e.f. 1.6.2000 as notified in GSR 371 (E), dated 1.5.2000 and therefore no power is conferred upon any court or any adjudicating officers to take notice of an offence under section 51 of the repealed Act after expiry of two years from the date of commencement of FEMA, nor the Central Government is vested with powers to make appointment of officers. The petitioners also questioned the proceedings dated 20.3.2003 issued by Ministry of Finance and Company Affairs where under

the Central Government appointed certain officers as adjudicating officers as contemplated under section 50 r/w 49(1) of FERA. In nutshell, the contention of the petitioners is that the officers appointed under FERA are not recognized under the provisions of FEMA.

3. Respondents filed counter affidavit. One R.C.Mathur, Chief Enforcement Officer, Directorate of Enforcement, has sworn to the counter affidavit. Counter affidavit of respondents, in brief, is that the Department registered cases against the petitioners and, after conducting necessary investigation, the competent authority i.e. the Special Director of Enforcement issued show cause notices dated 22.2.95, 23.2.95, 13.6.95 and 15.6.95 to the petitioners for contraventions of the provisions of FERA. Show cause notices were issued within the time limit prescribed under FEMA, which repealed FERA. The FEMA, which came into force w.e.f. 1.6.2000 repealed the FERA and provided a limitation of two years for taking notice of contraventions under the repealed Act by the adjudicating officers as stipulated in Sections 49(3) and 49(4) of FEMA. The limitation period expired on 31.5.2002. In order to conclude the adjudication proceedings, call notices were issued to the petitioners including the call notice dated 12.5.2004 for conduct of personal hearing before the adjudicating officer. The petitioners failed to cooperative with the adjudicating officer in respect of earlier call notices. Had the petitioners co-operated with the adjudicating officers the cases would have been adjudicated long before the FERA being repealed. The notice-dated 20.8.2004 is only a call letter intimating the date of personal hearing and it is only a sequel to the show cause notice referred to above. The appointment of adjudicating officers was saved by the provisions of Section 49(4) of FEMA. Sec.49(4) of FEMA saves the operation of FERA regarding adjudication of cases wherein notices have been taken by the adjudicating officers on or before 31.5.2002. Since the cases registered under FERA have to be proceeded under the law and notifications/rules/regulations issued there under, the appointment of adjudicating officers should also be done under that repealed law. The appointment of adjudicating officers under the provisions of Sec.50 of FERA and assumption of charge by the Officer, therefore, do not suffer any infirmity or illegality in view of the enabling provision in FEMA. Section 49(4) of FEMA saves such acts of the Central Government as well as the adjudicating officer. The contraventions committed by the petitioners were registered under FERA and not

under FEMA. The contraventions in the instant cases therefore, have to be dealt only under the repealed Act as if the Act was not repealed as provided in Section 49(4) of the FEMA. The petitioners could have agitated the competence or otherwise of the adjudicating officer by appearing before him or by making a suitable application to him which would be considered by such adjudicating authority.

4. Heard learned counsel for the petitioners and learned Assistant Solicitor General appearing for the respondents.

5. Learned counsel appearing for the petitioners submits that since FERA has been repealed and in its place FEMA has been came into operation, appointment of adjudicator under the provisions of repealed Act is not legal and proper and therefore, the proceedings impugned in the writ petition are liable to be set aside. In support of his submissions, he placed reliance on the judgment of Supreme Court in ***Kolhapur Cane Sugar Works Ltd. v. Union of India***, wherein it has been held as follows:

> "The position is well-known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this Rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the Legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision."

He also placed reliance on the judgment of Supreme Court in ***AIR India v. Union of India and others***, wherein it has been held that if subordinate legislation is to survive the repeal of its parent statute, the repealing statute must say so in so many words and by mentioning the title of the subordinate legislation.

6. Learned Assistant Solicitor General appearing for the respondents submits that the offences committed prior to the commencement of FEMA have been saved under Section 49(3) of FEMA and therefore, the proceedings impugned in the writ petition are legal and proper. He further submits that since the notice issued to the petitioners are only show cause notices, they are at liberty to challenge the same by filing an explanation taking all the pleas available to him and thus, the writ petition is not maintainable. Reliance has been placed on the judgment of the Supreme Court in ***Special Director v. Mohd. Ghulam Ghouse***

7. It is no more in dispute that the respondents issued show-cause notices dated 22.02.1995, 23.02.1995, 13.06.1995 and 15.06.1995 to the petitioners for contraventions of the provisions of FERA. Subsequently, FERA came to be repealed and in its place FEMA came to be enacted. Section 49 of FEMA deals with repeal and saving. For better appreciation, I may refer Section 49 of FEMA and it is thus:

> "S.49. (1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under sub-section (1) of Section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.
>
> (2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.
>
> (3) Notwithstanding anything contained in any other law for the time being in force, no court shall tae cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under Section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.
>
> (4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act has not been repealed.

(5) Notwithstanding such repeal,--

a. anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

b. any appeal preferred to the Appellate Board under sub-section (2) of Section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

c. every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of Section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in sub-section (3), the mention of particular matters in sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

8. A plain reading of Section 49 indicates that the offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act has not been repealed. The show-cause notices in the instant case came to be issued in respect of the offences committed by the petitioners prior to the enactment of FEMA i.e. while FERA was in force. Appointment of adjudicators under the proceedings impugned in the writ petition are only to deal with the matters relating to the offences committed prior to the enforcement of FEMA. The said proceedings are saved by sub-section (4) of Section 49 of FEMA. Therefore, the writ petition is devoid of merits and is liable to be dismissed.

9. Accordingly, the writ petition is dismissed. No costs.

B.SESHASAYANA REDDY, J.

Date: 21st November, 2005.

Note:

L.R. copy to be marked.

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